MCLE EVALUATION COMMISSION REPORT

A. BACKGROUND

The MCLE Evaluation Commission ["Commission"] was appointed in the summer of 1999 and charged to examine all aspects of the Minimum Continuing Legal Education (MCLE) program, gather information, conduct hearings and report back to the Board of Governors. The Commission's options included leaving the MCLE program intact, modifying it or eliminating it.

The Commission's appointment followed in the wake of then Governor Wilson's veto of the State Bar's 1998 fee bill and a period when enforcement of the MCLE program was in abeyance pending the outcome of the appeal of *Warden v. State Bar* ("*Warden*") before the California Supreme Court. Both occurrences increased scrutiny of State Bar programs by bar members and legislators. As MCLE is required of all active members of the State Bar, few attorneys are indifferent toward it.

California's MCLE program began in 1989, when Governor Deukmejian signed into law Senate Bill 905 (Davis), the continuing legal education bill. (SB 905 added Section 6070 to the Business and Professions Code.) The 1989 legislation required the State Bar to request the California Supreme Court to adopt a rule of court authorizing the State Bar to establish and administer an MCLE program. On December 7, 1990, the Court adopted Rule 958, the MCLE Rule of Court. The MCLE Rules and Regulations were approved by the Board of Governors on December 8, 1990. The MCLE program officially began on February 1, 1992.

Rule 958 provides a skeletal outline of an MCLE program and authorizes the State Bar Board of Governors to adopt more detailed rules and regulations. The Rule, following Section 6070's blueprint, required 36 hours of education every three years, and as part of those 36 hours, eight hours of ethics or law practice management, with at least 4 hours of ethics. Rule 958 also gave the State Bar authority to mandate legal education in other specified areas within the 36-hour requirement. In response to the 1989 *Report on Gender Bias in the Courts*, which found that bias existed in the legal profession and recommended education as a means of eliminating it, the bar mandated one hour of education in elimination of bias in the legal profession. The bar also added a one-hour requirement for education in detection or prevention of substance abuse or emotional distress, because substance abuse is often a factor in attorney discipline cases.

In adopting Rule 958, the Court exempted, pursuant to Section 6070, four classes of active members of the State Bar:

1. Officers and elected officials of the State of California
2. Full-time professors at law schools accredited by the State Bar or the ABA
3. State of California employees, and
4. Retired judges.

In Rule 958, the Court added an exemption for

5. Federal employees.

The Legislature amended the MCLE program in the State Bar fee bill adopted in October of 1999. The amendments, set forth in Section 6070, reduced the total number of MCLE hours required every three years from 36 to 25, reduced the 8 hour ethics/law practice management requirement to 4 hours of ethics, and removed the exemption for retired judges.

B. THE COMMISSION AND WHAT IT DID

The 12-member MCLE Evaluation Commission began its review of the MCLE program in the wake of the Legislature's amendments to Section 6070 and the California Supreme Court's decision to uphold the constitutionality of the MCLE program. Then State Bar President Raymond Marshall's appointments to the Commission represent diverse constituencies and encompass a wide-ranging expertise. The Commission includes eight attorneys, two judges and two public members. Many Commission members wear several hats. The public members include the president of the California League of Women Voters and the executive director of the California CPA Education Foundation. The Commission's judicial members include a superior court judge and a federal court judge. The attorney members represent several types of MCLE providers (bar association, law school, and commercial educator) and include local bar association leaders, a law school dean, a legislative chief-of-staff and an in-house counsel. A past president of the State Bar served as Commission chair. [See **Exhibit 1** for a list of Commission members.]

Meetings

The Commission met in person on October 3 and November 13 of 1999 and on January 15, April 1 and December 9 of 2000. It also met by telephone conference call on June 15 and December 15, 2000.

Review of Materials and Other States' Experiences

Between meetings, Commission members reviewed the relevant literature [see **Exhibit 2]**, including ALI-ABA's 1991 publication *Attaining Excellence in CLE: Standards for Quality and Methods for Evaluation*. It also reviewed the MCLE survey done by the *California Bar Journal* ["*Bar Journal*"] in June of 1999 [see **Exhibit 3**] and the State Bar's Report on the MCLE focus groups it held with members in 1997 ["Focus Group Report"][see **Exhibit 4**]. The Commission also talked to representatives of some other state bars' MCLE commissions, and the Commission reviewed the rules applicable in the 40 mandatory CLE states.

Public Hearings

During 2000, the Commission conducted six public hearings with members and representatives of local bar associations:

April 1	State Bar's Mid-Year Meeting in San Francisco
April 25	Riverside
May 2	Chico
May 9	Los Angeles
May 16	San Francisco
May 25	Fresno

See **Exhibit 5** for a summary of the information gathered at the various public hearings.

Provider Survey

The Commission also sent a mail survey to a diverse sample of MCLE providers selected to include a cross-section of providers by type of provider (bar association, commercial educator, law firm), size of provider (small v. large) and the various types of markets served (geographical area v. practice area). See **Exhibit 6** for a summary of the provider survey results.

Need for Telephone Poll

The MCLE program affects almost all State Bar members. The members attend the programs, have first-hand knowledge of them, and are obviously the best judge of what they think about them. The Commission became convinced that a statistically reliable survey was needed relating to what bar members thought about MCLE and how it could be improved. There had, to be sure, been two prior surveys, but they produced rather conflicting results, and neither was statistically reliable: The 1997 MCLE focus groups had been very positive about MCLE, while the1999 *Bar Journal* survey was quite negative. Focus group members had been randomly selected, but the sample size was not big enough to generalize across the entire membership. On the other hand, the focus group format was oral, and allowed members to express a more nuanced view of MCLE than the basically up or down written vote that the *Bar Journal* survey allowed. And, while more members responded to the *Bar Journal* survey, the results could not be generalized across the entire membership, because responding members self selected. Very few lawyers attended the Commission's public hearings, and they were also self selected.

Accordingly, a statistically reliable survey that could be generalized across the entire membership seemed called for. A telephone survey was most likely to achieve that goal, because telephone polling is oral, is not self selected, and makes it easier for those being surveyed to respond.

After receiving Board authorization to poll the membership, the Commission worked with Richard Hertz of Richard Hertz Consulting to design a telephone survey and to poll members on their views about MCLE.

Mr. Hertz suggested polling 600 (and polled 601) randomly selected bar members. As his report states [see "Survey Background Facts"], "The margin of sampling error for a survey this size is approximately +/- 4% at the 95% confidence level. This means that the results of the sampling for each question would reflect the opinions of the entire state bar give or take 4% for each number. The 95% confidence level means that in 19 out of 20 surveys administered, the results would fall within the 4% margin of sampling error."

Apparently, people feel an obligation to respond when they know that they have been chosen as part of a random sample, but Mr. Hertz was amazed at lawyers' willingness to talk about MCLE. (He noted that while it is getting harder to get people to respond to phone surveys, most of the lawyers surveyed were more than willing to take the time to do so. Indeed, several members were pleased that the bar was polling members about their views.)

The demographic profile of the survey sample paralleled the bar's actual profile as reflected in the most recent relevant bar survey (conducted in 1991) [see **Exhibit 7**].

Exhibit 8 includes the entire MCLE survey report prepared by Richard Hertz.

Results of Poll in General

The results of the telephone poll were, in general, quite positive. Continuing education is valuable to professionals, and no poll respondent (nor anyone in any survey) quarreled with that obvious truth. In particular, some 51% of telephone survey respondents rated California's MCLE program as good (45%) or excellent (6%); 77% rated the quality of the program's presenters as good (58%) or excellent (19%); 71% rated the written materials the presenters provided as good (55%) or excellent (16%); and only 8% said no MCLE hours should be required.

Those positive grades are particularly striking, since the program is mandatory, and we expect that most people, particularly lawyers, are not enthusiastic about being required to do most anything. However, there is certainly room for improvement. Though only 4% of survey respondents rated the quality of presenters as poor, 19% rated them as average. Also, a significant minority (18%) rated the program overall as poor, and 30% as average. Average is a passing grade, but it is not a high grade. It is important to improve the program's quality. Its primary goal is to maintain and enhance the profession's skills, and so protect the consumers of its services. See *Warden v. State Bar of California* (1999) 21 Cal. 4th at 628 (program's primary purpose is consumer protection). The better the program is, the better it will achieve that goal.

This is Mr. Hertz's summary of the poll's results (see **Exhibit 8** at p. 4):

> "The majority of respondents acknowledged the need for some form of CLE program and felt that most aspects of the program worked reasonably well. However, the resentment many expressed regarding some of the required sections of the program that many said are not useful to them casts a shadow over their overall perception of the program's value.
>
> Most respondents gave basically positive assessments of the specific workings of the program. A majority rated the overall quality of the program as good or better. Large majorities rated the quality of presenters and written materials and the availability of CLE courses in their field of practice and their geographic area as excellent or good. Most respondents also said it was easy for them to get information about CLE courses being conducted in their field of practice and in their geographic area.
>
> The survey isolated some specific aspects of the program that a substantial number of respondents felt could be improved. The most common group of complaints about the program centered upon some of the mandatory subject requirements. A substantial majority of respondents said the portions of the program dealing with substance abuse and stress reduction and eliminating bias in the legal profession were of little or no use to them. More than anything else, these requirements were seen as the least productive aspects of the program.
>
> Some respondents also expressed concerns regarding the availability of CLE courses in their field of practice at an appropriate experience level for them. Having more advanced courses in their field of practice was the improvement suggested most often in this regard.

A majority of respondents felt the current 25-hour CLE requirement or an even higher number of required CLE hours was appropriate. The cost and availability of ways to obtain CLE credit was also largely seen as acceptable, although some expressed concerns regarding the cost of attending programs in person and the impact of these costs on sole practitioners and newer attorneys.

Survey respondents were evenly divided about whether or not the required elements of the program did a good job at improving the profession and protecting the public. A significant majority disagreed with the policy exempting some attorneys from MCLE requirements.

To the extent this survey serves as a basis for potential changes in the MCLE program, the results suggest that a greater emphasis on subject matter that is seen as directly relevant to the needs of attorneys would be of greatest importance. Besides reviewing the current requirements for mandatory components of MCLE, this could also include taking into account such requests as having more course offerings at different experience levels within specific fields of practice and offering more courses over the Internet."

C. WHAT THE COMMISSION LEARNED

There were five major issues:

1. **Should we have MCLE at all?**
2. **Should we have mandatory subjects?**
3. **Should there be exemptions to the program?**
4. **Do the basic mechanics of the program work?**
5. **Is the quality of education activities adequate and can it be improved?**

In summary, most lawyers:

1. **Accept the need for the MCLE program.**
2. **Don't like most mandatory subject requirements.**
3. **While unhappy about the exemptions to the program, resent these less than some of the mandatory subject matter requirements.**
4. **Have some but not major problems with the basic mechanics of the program.**
5. **In general give high marks to the quality of programs and presenters, but have criticisms and suggestions for improvement.**

We address these issues in order.

1. EVALUATION OF THE PROGRAM IN GENERAL SHOULD MCLE BE MANDATORY?

There is considerable consensus among the various surveys and reports on most issues, with the exception of the results of the *Bar Journal* survey regarding whether the MCLE program should be mandatory.

Telephone Poll

When asked "Overall, how would you rate the current California MCLE program, excellent, good, average or poor?", 6% rated it as Excellent, 45% as Good, 30% as Average and 18% as Poor. Also, 77% rated the quality of the program's presenters as good or excellent, and 71% rated their written materials as good or excellent. Only 8% said no MCLE hours should be required.

When those who gave positive ratings to the program were asked why they felt that way, the most common reasons were that MCLE was "useful/informative" and "helps improve profession."

When those who gave negative ratings to the program were asked why they felt that way, the most common reasons were that MCLE courses were not relevant or useful. That is troubling, and needs to be addressed.

Bar Journal Survey

67% of respondents said that continuing legal education should not be mandatory. The *Bar Journal* survey appeared in a monthly newspaper sent to all bar members. Some 2.5% of bar members responded to that survey. The 2.5% return rate is excellent (as noted in the *Bar Journal*, pollsters "generally say a 1 to 2 percent response is considered excellent"). However, respondents to the *Bar Journal* survey "self-selected," as opposed to being randomly selected. Self-selection tends to over-represent those with strong, and usually negative, opinions.

1997 Focus Groups

82% of focus group members were in favor of continuing the MCLE program. 18% were opposed.

Other States

Forty other states have mandatory CLE. One additional state, Alaska, has a voluntary requirement with mandatory reporting. (See page 9 below regarding required hours.)

2. MANDATORY SUBJECT MATTER REQUIREMENTS

Telephone Poll Results

Subject Matter	% Very Useful	% Somewhat Useful	% Little Use	% No Use	% Uncertain
Ethics	21	45	17	16	1
Elimination of Bias	7	25	22	43	4
Substance Abuse/Stress	4	15	24	53	4

When asked whether the mandatory requirements were "useful in terms of improving the profession and protecting the public":

% Useful	% Some Are Useful/Some are Not				% Not Useful	% Uncertain
39	19				38	4
	Least Useful					
	Subs Abs	Bias	Ethics	Uncertain		
	73	61	27	11		

Bar Journal Survey
"Should the following specific subject areas be required?" These are the percentages of "yes" answers:

Ethics	=	46.4%
Law Practice Management	=	18.6%
Elimination of Bias	=	11.5%
Substance abuse/stress	=	10.1%
None or no response	=	46.9%

1997 Focus Groups
Focus group members generally believed that an ethics requirement (and even a law practice management requirement) is important, although some were in favor of eliminating all special requirements. Some even suggested eliminating all activities in non-substantive areas, particularly those on "pop" financial management and "pop" psychology. Many focus group members expressed a desire to get rid of the substance abuse and elimination of bias requirements.

Other States
Most states require ethics courses. Very few require courses in either substance abuse or elimination of bias.

3. EXEMPTIONS (See page 1 above)

Telephone Poll
The telephone poll asked respondents if those groups exempt from MCLE should be. 63% said none of these groups should be exempt. 18% said all these groups should remain exempt. 13% said only some groups should be exempt, and state and federal employees were most often cited as those who should not be exempt. 6% expressed uncertainty about this question.

Bar Journal Survey
The *Bar Journal* survey asked members what they thought about the exemptions that the Court of Appeal found problematic in the *Warden* case: retired judges, full-time law professors at accredited law schools, and officers and elected officials of the state of California. Approximately three-quarters of respondents felt that retired judges and law professors should not be exempt (approximately 25% believed they should be). Fully 85% of respondents believed that officers and elected officials of the state of California should not be exempt (with about 13% believing that they should be exempt). The *Bar Journal* survey did not ask whether state and federal employees should be exempt from the requirement.

1997 Focus Groups
To quote from the Focus Group Report, "When asked about the various exemptions to the MCLE program, members indicated that all the categorical exemptions are a source of resentment. Non-exempt members were troubled by all the exemptions. Members believe that all lawyers, including those who are exempt from the MCLE requirement, need training in ethics and conflicts of interest."

Other States
Many states exempt judges. Some (16) exempt lawyers over 65 or 70. Some exempt legislators or elected or public officials (11 states, 5 only if member is not practicing law). One other state, Texas, exempts law professors from all but the ethics requirement.

4. PROGRAM MECHANICS

a. Total Hours Required

Telephone Poll
At the time the telephone poll was concluded, the MCLE requirement had just changed from 36 to 25 hours. Those surveyed were asked whether "more than 36 hours, 36 hours, 25 hours, or less than 25 hours" were appropriate:

5% thought more than 36 hours were appropriate
22 % thought 36 hours were appropriate
40% said 25 hours were appropriate
20% said less than 25 hours were appropriate
8% said nothing was appropriate
4% were uncertain

Bar Journal Survey

At the time the *Bar Journal* survey was done, the MCLE requirement was 36 hours. In answer to whether the "present requirement of 36 hours in three years" was too many, too few or enough hours:

3 % said 36 hours were too few hours
26.8 % said 36 hours was enough hours
62.9 % said 36 hours was too many hours
7.3 % did not respond

1997 Focus Groups

This issue of the appropriate number of hours was not addressed.

Other States

The Commission compared the number of hours of continuing education (CE) required annually of California attorneys against the CE requirements for attorneys in other states [see **Table 1** below] and for other professions in California [see **Table 2** on the next page]. (CE requirements have been converted to annual requirements for ease of comparison.)

The CE requirement for California attorneys is the lowest among all other MCLE states and among the lowest of other California professions. Of the 50 states and the District of Columbia, 40 have mandatory continuing education requirements, 1 has voluntary attendance but mandatory reporting and 10 have no requirement. The table below shows the number of hours required on an annual basis by the 41 jurisdictions with a mandatory or voluntary requirement.

TABLE 1 TOTAL CE HOURS REQUIRED OF LAWYERS IN OTHER MCLE STATES

# HRS REQUIRED ANNUALLY	NUMBER OF STATES WITH REQUIREMENT
15	15*
14	1
12.5	1
12	19
10	4
8.33	1 (CA)

* Includes Alaska which has a voluntary requirement with mandatory reporting.

TABLE 2 TOTAL CE HOURS REQUIRED OF OTHER CALIFORNIA PROFESSIONS

# HRS REQUIRED ANNUALLY	PROFESSIONS WITH THIS REQUIREMENT
40	Accountants
25	Doctors
12.5 – 25	Dentists (depending on designation)
18	Psychologists; marriage, family & child counselors; social workers; veterinarians
12 – 16	Speech-language pathologists and audiologists (12 hrs if one license held; 16 hrs if both licenses held)
15	Acupuncturists, nurses, psychiatric technicians; barbers, cosmetologists
14	Real estate appraisers
11.25	Real estate brokers
5.33 – 9.33	Structural pest control operators (hours based on number of branches of pest control for which licenses are held)
9	Hearing aid dispensers

b. Length of Reporting Period

Provider Survey

When asked whether compliance periods ("reporting periods") should be one or three years long, most providers agreed on a three-year reporting period. Only one provider (a national law firm) indicated that three years was too long a period to expect attorneys to keep their own records, and thought a two-year reporting period would be a good compromise.

Telephone Poll, *Bar Journal* Survey, 1997 Focus Groups

The length of the reporting period was not addressed in these surveys.

Other States

Other states vary. Twenty-five states require reporting every year, and 16 require reporting every other year (7) or every three years (9).

c. Availability of Information re Course Offerings

Telephone survey

85-86% of survey members said it was reasonably easy to get information on MCLE courses in their practice field and in their geographical area, and only 11-13% said it was not. A suggested method of providing that information, not currently in use, was to have it posted on or linked to the State Bar web site.

d. Cost of Live Courses

Telephone Survey

54% said the cost of these courses was reasonable, and 37% said it was not. On the other hand, 70% said that public classes were most effective.

e. Cost of Courses on Tape or Internet

Telephone Survey

72% of survey respondents said the cost of courses on video or audio tape or the Internet was reasonable, and 18% said it was not. On the other hand, only 16%, 9% and 5%, respectively, rated audio tapes, videotapes and Internet courses most effective.

f. Availability of Courses in Field and in Geographic Area

Telephone Survey

74% rated availability of CLE programs in their geographic area as excellent or good, 14% as average, and 10% as poor. 70% rated availability of CLE programs in their field of practice as excellent or good, 17% as average, and 12% as poor.

Respondents felt that these problems, where they existed, could be ameliorated by more local and evening classes, and more tapes and Internet courses.

We address availability of classes at appropriate levels under **QUALITY**, below.

g. Tapes and Internet Programs

California permits 50% of the required credits to be earned through self-study. If not self-study, California places no restriction on the number of credits that may be earned through viewing or listening to tapes, or taking courses through the radio or the Internet, if "participatory."[1]

[1] Self-study means taking and self-verifying attendance at an education activity (video, audio, Internet). Thus, viewing or listening to the same video, audio or Internet course can be either participatory or self-study, depending on whether attendance is verified by a provider or self-verified. Participatory activities are not subject to the 50% self-study credit limitation.

Other States

Many states that permit CLE credits to be earned through viewing or listening to tapes require a moderator or instructor to be present (and some require a question and answer period (" Q&A") led by an instructor or moderator).

5. QUALITY

Telephone Poll

The respondents gave MCLE programs generally good marks. See pages 4 and 6 above. In particular, over 70% rated the program's presenters and written materials as good or excellent, about 20% rated them as average, and a very small minority rated them as poor:

QUALITY	% Excellent	% Good	% Average	% Poor	% Not Sure
Presenters	19	58	19	2	2
Written Materials	16	55	23	4	2

On the other hand, average is still not a good grade, and, in particular, some 40% of respondents rated the availability of programs in their field at the appropriate experience level as average (25%) or poor (15%). Some said the courses and written materials lacked depth, presenters needed to be more experienced and better prepared, and written materials needed to be more detailed, practical and better organized. We expect these comments about lack of depth and lack of program content at sufficiently high levels account for a good part of the occasionally angry comments from respondents (*e.g.*, courses aimed at lowest common denominator, courses are a waste of time and money).

These are minority views, but they cannot be overlooked or disregarded.

Bar Journal Survey

"Generally, over the past five years, were the MCLE courses you took

Unsatisfactory = 49.3%
Satisfactory = 48.9%
No response = 1.8%

Letters that accompanied these responses raised specific concerns like those expressed by the minority of respondents in the telephone poll (*e.g.*, "only half the courses I've taken gave me useful information"; require providers to label courses as beginning, intermediate, advanced; courses are "far too elementary and repetitive").

1997 Focus Groups

The Focus Group Report (**Exhibit 5**, pp 4-5) said the following about quality:

"**Quality** Members are interested in quality MCLE programs. Ideally, members would take education activities in their substantive area where the law is accurately stated by good speakers at a level appropriate to the attendee's experience, with well-drafted and useful substantive written materials. If a program is also cheap, so much the better. However, many attorneys are willing to pay more for a good course. Indeed, one Los Angeles attorney indicated that his time was valuable and that he would not sit through a bad program. Another expressed the belief that MCLE should be trying to teach you to be creative, not just to prevent ineffective assistance of counsel.

Members said that the quality of education activities varies. Some education activities are good, some are boring. Members indicated that education activities are "bad" if the underlying material isn't very good, if the substantive written materials are not organized, if the speaker reads from a prepared speech, or if the whole course consists of a videotape. . . .

Speakers are the most important ingredient in a high-quality education activity. In choosing what they hoped would be a good education program, members "look at the panelists and at the subject area." Even a talking-head panel can turn out to be a good education program if the speakers are good talking heads. Members indicated that a good speaker does not just read a prepared text or summarize the written materials. S/he moves outside the text to incorporate the experience of attendees.

'With some providers, I've never had a bad program. With other providers, program quality varies, usually depending on the speaker. When providers utilize volunteers as speakers, program quality varies widely.'

. . .

"**Availability of Advanced Education** Focus Group members were asked about the availability of quality education at advanced levels. One attorney said, 'Courses in my practice area don't change much from year to year so it gets harder to find relevant courses.'

Members indicated that they would like providers to accurately advertise the level of an education activity as 'beginning,' 'intermediate' or 'advanced' so that they could choose a course at an appropriate level."

Provider Survey

Providers in general believe MCLE provides excellent information in most if not all practice fields and geographical areas, at least in the major metropolitan areas. Some commented, however, that courses tend to teach basics, there may be too few at higher experience levels, and the experience level the course is aimed at should be identified.

California Rules

California requires that MCLE providers meet quality standards, and in particular that "all continuing legal education activities must" have "significant current intellectual or practical content for members" (*MCLE Rules and Regulations*, rule 7.1). California also requires that providers certify that their activities meet that standard (MCLE Rules 7.0, 8.0, 9.0). Providers also must allow monitoring of their compliance with that standard, and make evaluation forms available to participants, so that they can evaluate the program and its presenters. Providers must keep those evaluation forms for a year, and make them available to the State Bar on request.

The bar lacks sufficient funds or personnel for in-person auditing of programs. Therefore, as a practical matter, participants must rely on the provider's certificate of compliance, its good faith, and the market place to assure that the provider's programs meet quality standards. However, the bar may be able to take appropriate steps based on evaluations, if summarized. See below at page 21.

Other States

We understand that other states likewise do not monitor or audit individual programs in person.

Literature

There have been significant studies about how to teach adults, and in particular lawyers, effectively. See, e.g., *Teaching for Better Learning*, ALI-ABA 1999. Lectures, for example, can provide a lot of information efficiently, interactive teaching may increase interest and involvement, interactive videos for trial advocacy may be particularly useful, Q&A with a strong moderator in charge of a panel can be helpful and capture interest, visual aids and role playing can be useful, and so on. See *id*. at 20, 23 and Appendix D at 100. Cf. telephone survey question 7A ["please give us your suggestions as to how you feel they [education activities] could be improved" (noting some respondents suggested more interactive classes)]. ALI-ABA has also published a treatise, called *Attaining Excellence in CLE—1991*, which addresses quality evaluation standards for CLE programs. That treatise, however, warned that it is meant "only for voluntary use by the providers themselves." *Id*., at 10.

That caveat also accorded with the Commission's view of its role. The Commission lacks the expertise to advise providers as to how best to teach lawyers, and the Commission did not understand it had any such charter. See **RECOMMENDATIONS AND CONCLUSIONS** below. We can, however, commend that literature to providers, and, apropos of the survey comments, note this ALI-ABA observation--really a truism: Adults learn best and most willingly "when they believe that the learning will be useful and relevant." *Teaching for Better Learning* at 23.

D. RECOMMENDATIONS AND CONCLUSIONS

1. SHOULD CLE BE MANDATORY?

Conclusion: YES

Mandatory CLE is important to protect the public and to improve the profession. When asked the reason for their rating of the MCLE program, the telephone poll respondents' most common answers were that it was useful and informative (30%) and that it improves the profession (13%) by helping members keep current, increase knowledge and enhance skills.

In addition, 40 other states mandate CLE and most other California professionals are required to complete continuing education. Accountants requirements are highest at 40 hours per year, but 15-18 hours per year is common and 12 is on the low side. Only real estate brokers, hearing aid dispensers and structural pest control operators have requirements that are lower than 12 hours. It would be cavalier, if not shocking, were California lawyers excused from the obligation to continue to learn, while all those other California professionals, and most lawyers across the land, are required to discharge it.

Indeed, we believe it serves no useful purpose to keep looking at whether CLE should continue to be, and it is time to put that issue behind us. The program is: It is part of being a lawyer here and in most states. It is part of being a professional here and in most states. Education for all lawyers is valuable, and no one seriously argues it is not. It would be a big step backward, and would undermine public confidence in the profession and lower its standards, were we to abandon California's MCLE program. The profession does not ask for that or want it. In fact, bar members give California's MCLE program quite high marks. The real need, and goal, is to make California's program still better, and in particular to enhance its quality and ensure its relevance to all members at all experience levels.

2. MANDATORY SUBJECT MATTER REQUIREMENTS

2a. Legal Ethics

Most states require legal ethics, two thirds of the telephone respondents found it very or somewhat useful, and it is an essential discipline for lawyers to master. The Commission finds no reason to suggest that the requirement be eliminated.

2a. Recommendation:
Continue to mandate 4 hours of legal ethics

2b. Elimination of Bias in the Legal Profession

Very few states require this course, and two-thirds of the telephone respondents found it had little or no use. We are mindful of our members' concerns about this, but we conclude that California has made the right choice here. There is bias in the profession. The question is not whether it is intentional. Rather, the question is whether California lawyers and the clients they serve are better off by maintaining programs directed at eliminating bias in the profession. We believe the answer is yes. Bias is reflected in many ways, some subtle, some not, and none of us can be aware of all of them. Indeed, one-third of the telephone respondents found elimination of bias courses very or somewhat useful.

We look forward to the day when bias is no longer an issue, but that is not today, and eliminating the requirement would send an untoward, unwise and untimely message.

2b. Recommendation:
Continue to mandate 1 hour of elimination of bias in the legal profession

2c. Substance Abuse

This requirement is counterproductive. Very few states have it. Less than 20% of the telephone survey respondents found it at all useful, 29% found it of little use, and fully 53% found it of no use at all. Most lawyers believe the course does not pertain to them and does not help those to whom it does; we know of no evidence suggesting they are wrong. Also, the requirement is a great irritant and induces disrespect of the program; thus the most biting comments are reserved for it (*e.g.*, from a letter accompanying the *Bar Journal* survey: "I'm still fuming about a stress/substance abuse course").

This is not to say there is no substance abuse problem here. In fact, 40-60% of sole practitioners who end up in the attorney discipline system have a substance abuse problem; out of a sample of 1,000 abandonment cases in the attorney discipline system in the mid-1990's, 40% of respondents listed alcohol or drug addiction as part of their defense. The difficulty is that the disrespected substance abuse requirement is not an effective way to deal with the problem. The Commission notes that an attorney substance abuse diversion program has been proposed that seems to be a direct and effective way to deal with it. The proposed attorney substance abuse diversion program would be modeled on the diversion program for physicians. Legislation to create an attorney substance abuse diversion program is expected

to be passed in 2001 and effective in 2002. It is hoped that lawyers would self-refer themselves to the substance abuse diversion program before they harm clients and end up in the attorney discipline system: 58% of those in the physician diversion program are self-referred.

While the Commission recommends that the substance abuse requirement be eliminated, it would continue to allow credit for education in the area of substance abuse; this is a problem, and those seeking continuing education to deal with it should have that opportunity. However, the Commission recommends that credit for stress reduction be eliminated; many of the "fringe" courses tend to fall under that rubric, and stress reduction is, after all, not a legal discipline.

2c. Recommendation:

Eliminate mandated hour of detection/prevention of substance abuse and/or emotional distress. Continue to allow attorneys to claim credit for detection/prevention of substance abuse, dis-continue allowing credit for stress reduction or emotional distress.

2d. Other Mandatory Courses

Some have suggested other mandatory courses, like skills training for new admittees or courses within one's practice area for practitioners. There is, however, no evidence that lawyers do not seek out courses they find most useful and relevant to them. The Commission is not persuaded that there is cause to mandate lawyers to do so.

2d. Recommendation:

The Commission makes no recommendations on additional mandatory requirements such as skills training for new admittees or mandating lawyers to do a certain number of hours in the subject area in which they practice.

3. EXEMPTIONS

3a. State Officials; Law School Professors; State & Federal Employees

All surveys show that bar members take strong exception to these exemptions. Very few states have anything like them in scope. The MCLE program is valuable, and all three branches of government have endorsed it: the Legislature, which enacted it; the Executive, the Governor having signed it into law; and the Judiciary, the Supreme Court having issued a Rule of Court regarding it. The Commission finds no principled reason to exempt any group from it, and exempting some groups from it makes those not exempted resentful. Therefore, the exemptions are counterproductive.[2]

[2] The exemption for retired judges was eliminated when Business and Professions Code section 6070 was recently amended. And, as law professors get credit for teaching, they do not really need to be exempted from the requirement.

3b. Other Exemptions

At one public hearing, several senior bar members and some pro bono attorneys suggested that they ought to be exempted, citing, among other things, cost concerns. The Commission understands that bar members whose professional income is limited may find the cost of CLE programs burdensome. The Commission does not believe that exemptions are the solution to that problem. Practicing senior lawyers and pro bono lawyers profit from CLE just as other practicing lawyers do, and it would be jarring, and perhaps unethical, not to require lawyers who serve the poor to meet the same requirements as those who serve the more affluent. The cost problem can be addressed in other ways, like requiring providers to charge discounted rates for some, should the Bar find that apt. See section 4d below.

3a-b. Recommendation: Eliminate all exemptions to the program.

4. PROGRAM MECHANICS

4a. Total hours required

Forty states mandate CLE (and one mandates reporting). About 60% of the states have compliance periods of more than one year, but the yearly requirement over the compliance period in 15 states is fifteen hours, in 1 state fourteen hours in 1 state twelve and one-half hours, in 19 states twelve hours, and in 4 states ten hours. California's current requirement, recently reduced pursuant to statute to 8.33 hours per year, is the lowest in any state.

We do not understand the statute to require that the hours be no more than 25 over three years in California, but that the hours be no less than 25. There is no apparent reason why California's requirement should be below the lowest in the country. However, being mindful of the Legislature's recent judgment, we do not recommend that the requirement be returned to 36 hours.

4a. Recommendation: Require 30 hours every three years, beginning February 1, 2005.

4b. Length of Reporting Period

The three-year reporting rule does result in some lawyers taking more, if not substantially all, courses in the third year. That does not seem desirable, but also does not seem a major problem. Our members seem to like the flexibility a three-year period allows, and it would be more burdensome for the State Bar were it to have to monitor compliance for all lawyers annually.

4b. Recommendation: On balance, we recommend no change.

4c. Availability of Information on Course Offerings

This seemed not to be a real problem, since 85% of survey members said it was reasonably easy to get information on courses in their geographic area and practice field. However, it

does seem useful, if practical, to provide information with respect to all public offerings in a central place. That should ensure that all members can easily find information about all offerings. The central place might be the State Bar's website, perhaps utilizing links to provider websites. (This might also help in respect to ensuring reasonable prices and high quality. See sections 4d-e below.)

4c. Recommendation:
Bar staff fashion a proposal to establish a central website or links to provider websites where members could find information about approved education activities.

4d. Cost of Live Courses

A majority of telephone respondents found these costs reasonable, but a significant minority did not. This problem is alleviated somewhat by the relatively low cost offerings on tapes, the Internet, newspaper self-assessment tests, and radio programs. However, 70% of respondents found live classes most effective. Accordingly, it is important that those classes not be priced out of the reach of a substantial percentage of lawyers.

The program relies on a free market to hold down costs, but that assumes consumers are aware of the products available on the market and their prices. To the extent high prices are a problem, presumably a central place, where all public offerings and their prices are published, would tend to reduce them. Again, a State Bar website with appropriate links seems a likely candidate.

The State Bar itself is not in a position to regulate providers' prices. We assume it may, however, encourage providers to offer discounts to lawyers who need them, or perhaps even require providers to offer them. (See discussion of senior and pro bono lawyers, under "Other Exemptions" at D.3.b above.) On the other hand, requiring discounts for some might increase the price to others. In any case, whether and to whom to provide discounts presents a policy question analogous to the question whether Bar dues should be lower for some than for others, and thus is properly a question for the Board.

4d. Recommendation: None.

4e. Cost of Courses on Tape and Internet

A substantial majority of telephone respondents found these prices reasonable, so this does not seem a significant problem. To the extent it is, again a central listing of all such public offerings should stimulate competition and help reduce prices.

4f. Availability of Courses in Field and in Geographic Area

A substantial majority found no problem here. That may, however, not be so reassuring as it seems, since a substantial majority of California lawyers is situated in urban areas. Less populated areas enjoy fewer publicly offered classes. *See, e.g.*, the report of the Chico public hearing, at page 2 of **Exhibit 5**.

4f. Recommendation: That the State Bar

(1) Encourage public (see fn. 4, below) providers, especially local bars in rural areas, to offer classes where they can; and

(2) Take steps to ensure that the availability of tapes and Internet offerings is made known to everyone, again perhaps through a central listing.

4g. <u>Self-Study, Tapes and Internet</u>

California's self-study and tape/Internet rules are, compared to other states, quite generous. Also, the telephone poll respondents rated the effectiveness of tapes and Internet programs, compared to public and in-house classes, quite low. That is reason for concern. However, given competing concerns respecting availability of programs outside urban areas and the cost of in-person programs, eliminating credit for listening to or viewing tapes and Internet programs would create problems of its own, and may well be counterproductive. It would also run counter to the Legislature's mandate that the Bar seek to reduce program costs by, among other things, use of technical innovations like the Internet.

The Commission notes that, to earn credit for tapes, many other states require a moderator or instructor to be present, and some require the moderator or instructor to be available for Q&A. As a matter of common sense, a program that allows for Q&A is apt to be more productive than one that doesn't, and the literature (see page 14 above) is in accord. Requiring a moderator for Q&A in respect to tapes or Internet courses qualifying for participatory credit might, however, significantly increase costs or substantially limit the availability of those courses in non-urban areas. If so, there might be less intrusive ways of ensuring that Q&A is available for participants. For example, providers of Internet programs (which are increasingly popular) might be required to offer participants an opportunity to submit questions electronically.

4g. Recommendation:

Have bar staff investigate and seek provider input with respect to these and other means of making tapes and internet programs in some measure interactive. We also recommend that, should study show that any such means are practical and cost effective, the Board consider adopting a rule requiring them. The rule making process would, of course, include an opportunity for public comment.[3]

5. QUALITY

The Commission was encouraged by the generally high marks telephone respondents awarded the program, its presenters and their materials. However, the Commission was also concerned that a significant minority found the course offerings, presenters and materials

3 We make this suggestion in the hope that it may enhance the MCLE program. We do not make this suggestion out of concern that lawyers are not properly certifying participation in tape or Internet courses. We heard no such evidence. Indeed, the whole MCLE program depends on trust—certifying self-study participation, signing in at public programs, being attentive during programs, and so on; there are, after all, no tests (except in connection with newspaper self-assessment programs). We have received no evidence to suggest that trust is abused, and we do not believe it is.

average or below. Real quality is essential to the program; it is not fair, or very useful, to require people to attend continuing education courses that don't educate well.

The State Bar does not have the resources for an in-person audit of course offerings, and may lack the expertise to audit their effectiveness, anyway. Therefore, from the program's beginning, the Bar has relied on the market place to regulate the quality of programs and providers: The Bar assumed that lawyers would go to good programs presented by providers with good track records, and avoid poor ones. That premise has, in large part, proved sound; that, presumably, is the reason substantial majorities of the telephone respondents accorded programs, presenters and materials high marks.

But the less than high marks accorded by a significant minority to programs, presenters and materials suggests that, to date, the market has not been an entirely reliable regulator. In particular, the telephone poll and focus groups made clear that some members cannot find a sufficient number of courses in their practice area at the appropriate level, some complained that program content was shallow or directed to the lowest common denominator, and some complained that presenters were mediocre. The Commission expects that these problems likely result in part at least from the market's imperfections, specifically the lack of information available to all the program's consumers. The market is handicapped, we expect, in part because there is no central site where all public programs, tapes, and Internet offerings are listed, or where the track records of providers and presenters are published. Consequently, consumers can't choose the best among all programs, providers and presenters, because consumers do not know what they all are.

We do not suggest that a central listing would solve all problems. It ought, however, solve some of those our members complain about. We have already recommended that State Bar staff fashion a proposal to set up a central site in which all course offerings are listed. The State Bar web site, with appropriate links, may be such a site. [Pennsylvania (see www.pacle.com) has some experience in this, and may be a useful source of information regarding it.]

5. Recommendation:

In addition to the proposal for a central website, we recommend that the State Bar encourage and, where appropriate, consider proposing rules that mandate providers to:

5a. Identify the level of each public[4] course offered: beginning, intermediate, or advanced;

5b. Review the evaluation forms returned by participants in the programs the public providers present, and fairly record the grades received from those evaluations for each course offered, or, if that is impractical, fairly cumulate the grades accorded in all courses offered by the provider in each practice area in the last calendar year;

5c. Identify each presenter's experience level and expertise in the practice area in which the course offered falls;

5d. Publish 5a-c in materials advertising the program and at the central site.

4 We use "public" here to mean live courses offered to the public (as opposed, for example, to in-house courses).

5e. State Bar staff assess the feasibility of:

(1) the bar's reviewing the summarized evaluation forms (item b), and, based on them, taking appropriate steps regarding providers whose evaluations, other than occasionally, fall below par; and

(2) the bar's likewise taking appropriate steps based on other than occasional complaints submitted to it concerning the quality of a provider's programs.

5f. To the extent feasible, that bar staff fashion proposals analogous to items 5a-e above with respect to tapes and Internet programs offered to the public.[5]

The Commission recognizes that items 5a-d, and especially item 5b, may prove awkward or costly, especially for small, nonprofit providers. For example, publishing evaluation summaries for programs offered only once or twice would likely not be useful, since by the time the evaluations were published, the program might no longer be offered. Also, a few extreme evaluations up or down might significantly skew the results. Providers, when solicited by the State Bar for comments, will surely have important input in respect to these suggestions, and likely will propose other means to ensure that the market, which by hypothesis regulates them, is truly informed. But whether these ideas (which have not profited from that input) or other means are the solution, the goal is clear: Help ensure that the MCLE program is high quality by keeping the market informed as to what courses are offered, their level, the expertise of the presenters presenting them, and the provider's track record in respect to providing them.

The Commission, as we have said, is not in a position and lacks the expertise to propose specific ways to improve MCLE programs, or teaching techniques. The Commission at times found that frustrating. But it is convinced, as ALI-ABA was, that the providers are the right agents to improve their programs and teaching techniques. We hope and expect that, with the State Bar's encouragement and apprised of the telephone survey and their consumers' views, they will.

E. CONCLUSION

MCLE is here to stay, and deserves to be: It's a good idea, it does a good job, it helps the public, it improves the profession, and it is simply the right, professional thing to do. It can be made better, and should be. It is time to stop debating its right to be, and to concentrate our efforts on improving it.

5 As many tapes are taken from live, public courses, the evaluations submitted at the live course could be used to evaluate those tapes. It may be more difficult to cumulate grades for tapes and internet courses that are not the product of live courses, as providers currently are not required to provide evaluations for self-study courses. In any case, it is perhaps particularly important that grades as to tapes be published, as tapes are likely to be replayed more often than public courses are repeated.